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IN THE

Supreme Court of the United States

October Term, 1960.

No. 164

WILLIAM H. BURTON,
Plaintiff-Appellant,

v.

THE WILMINGTON PARKING AUTHORITY

and

EAGLE COFFEE SHOPPE, INC.,
Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM.

CLAIR JOHN KILLORAN,
801 Bank of Delaware Building,
Wilmington, Delaware,
Counsel for Appellee,
The Wilmington Parking
Authority.

International, 711 So. 50th St., Phila. 43, Pa.

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MOTION TO DISMISS OR AFFIRM.

Appellee The Wilmington Parking Authority, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed and/or that the judgment of the Supreme Court of the State of Delaware be affirmed on the grounds that the decision below was not in favor of the validity of a Delaware statute under the Constitution, treaties or laws of the United States; and that the question presented is so unsubstantial as not to need further argument.

Statement.

This is an appeal from the judgment of the Supreme Court of the State of Delaware, reversing the declaratory judgment and injunction granted by the Court of Chancery of the State of Delaware in and for New Castle County.

Appellant was denied service, solely on account of his race, in the restaurant operated by appellee Eagle Coffee Shoppe, Inc., as lessee of a portion of a public parking facility in Wilmington, Delaware, owned and operated by appellee The Wilmington Parking Authority. Appellant brought this action in the Court of Chancery of the State of Delaware in and for New Castle County seeking declaratory and injunctive judgment requiring Appellees to furnish service to him and persons of his race in the aforesaid restaurant. The Court of Chancery granted the relief prayed, but the Supreme Court of Delaware reversed the final judgment and injunction on appeal. The facts are virtually anomalous.

Argument.

A reading of the opinion of the Supreme Court of the State of Delaware, dated January 11, 1960 (text at page 29, Appellant's Jurisdictional Statement), discloses that the same does not depend upon a determination of the validity of state statute, Title 24 Delaware Code, Section 1501 (text at page 43, Appellant's Jurisdictional Statement), under the Constitution, treaties or laws of the United States, as Appellant contends, in an effort to establish his right to appeal under the provisions of Title 28 United States Code, Section 1257(2). The aforesaid opinion depends, rather, upon a determination that Appellee Eagle Coffee Shoppe, Inc., was not an agency of the State of Delaware. This is express in the said opinion (page 42, Appellant's Jurisdictional Statement) which held as follows:

> "We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would

be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware."

Even if the said opinion is construed as a determination by innuendo or allusion that Title 24 Delaware Code, Section 1501, is valid under the Constitution of the United States, the opinion, nevertheless, rests on an adequate non-federal basis, that is, that Eagle Coffee Shoppe, Inc., is not an agency of the State of Delaware.

It is therefore respectfully submitted that the decision below was not in favor of the validity of a statute of the State of Delaware; that no substantial question for the decision of this Court is presented; and that the appeal should be dismissed and/or the judgment of the Supreme Court of the State of Delaware should be affirmed.

CLAIR JOHN KILLORAN,
Counsel for Appellee, The Wilmington Parking Authority.

July 8, 1960.